

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO. 228 OF 1997

Tukaram Rama Patil
Residing at Shilgaon post
Padala, Tal. and District Thane. ..Applicant

V/s

1. Pandharinath Narayan Patil

2. Vishwanath Narayan Patil

3 Barku Narayan Patil
Respondent Nos. 1 to 3 residing
at Shilgaon, Post Padala,
Tal. and District Thane

4. Ratan Narayan Patil]

5. Gopinath Alo Kharbe

Respondent No.4 and 5
residing at Padale, Dist. Thane.

6. The State of Maharashtra ..Respondents.

Mr. P.R. Arjunwadkar, Advocate for the applicant.
Mr. K.S. Patil for respondent Nos. 1 to 5.

Mr. U.V. Nikam, APP for the State.

CORAM : J.H. BHATIA, J.

DATE : 27TH FEBRUARY, 2007.

ORAL JUDGMENT

. Heard learned Counsel for the parties. Perused
the record and proceeding.

2. This revision application is filed against the Judgment and order of acquittal passed by the learned Additional Sessions Judge, Thane in Sessions Case No.421/1992 for the offence punishable under Section 147, 148,149,302 r/w section 34 of Indian Penal Code.

3. The prosecution case, in brief, is that in the Election of Municipal Corporation Thane, from ward No.80 five persons from Congress Party were interested in being candidate. They included the present applicant, Balaram Patil, Tukaram Patil and respondent No.5 Gopinath. All the 5 aspirants had contributed Rs. 5000/- for the expenses of the election. The amount was deposited with P.W. 2 Sakharam Patil, who was the President of Congress Party for that area. The amount was given to the candidate, who would be nominated by the congress party and who would contest the election. Respondent No. 5 Gopinath was declared Congress Party candidate. He contested the election but was defeated. He demanded amount of Rs. 25,000/- from Sakharam Patil but it was opposed by other 4 persons. For this purpose, a meeting was held on 15/3/1992 in the office of Congress Party. It is alleged that respondent No.5

Gopinath abused the persons who were opposing the payment of the amount to him. He also abused applicant Tukaran Patil. Therefore, Madhukar S/o Tukaram intervened. On this, accused No.3 Barku assaulted on the head of Madhukar, with a cricket bat, while accused No.1 Pandharinath assaulted with iron rod. Other three accused, being accused Nos. 2,4 and 5, gave fist and kick blows to him. Due to the head injury, he fell down. He was taken to the different hospitals and finally, on the same day he died because of head injury. The report was lodged by the present applicant and the offence came to be registered. After investigation charge sheet was filed and respondent No.1 to 5 were put to trial. On behalf of prosecution in all 8 witnesses were examined. Out of them, P.W. 1 to 5 were eye witnesses. P.W. Sakharam did not support the prosecution case and was declared hostile. P.W. 1 Tukaram, who is present applicant, P.W. 3 Balaram, P.W. 4 Bhagwan and P.W. 5 Sitaram supported the prosecution case with slight variances. P.W. 7 Dr. Pravin Bagal was Autopsy Surgeon and he proved the cause of death. P.W.8 was investigating officer Viswas Marathe. P.W. 6 Bhima was a panch witness. The learned Additional Sessions Judge after scrutinising the evidence found

that the evidence of P.Ws. 1, 2, 4 and 5 was not reliable and in the result he passed the order of acquittal in favour of the accused persons.

4. Mr. Arjunwadkar, learned Counsel for the applicant, vehemently contended that if the prosecution evidence is carefully read it would reveal that there was consistent evidence of all the four eye witnesses that accused No.3 Barku had given a blow on the head of Madhukar with a cricket bat, while accused No.1 had assaulted him with iron chain. P.W. 5 Sitaram did not utter a word about beating by respondent No.2,4 and 5 with fist and kick blows, while other three witnesses deposed about the same. According to him, when there is consistent evidence of four witnesses, at least against respondent No.1 and 3, there were no justification for the order of acquittal. According to him, the order is wrong, illegal and perverse.

5. On the other hand, Mr. Patil, learned Counsel for the respondent Nos. 1 to 5 vehemently contended that this is not an appeal against the order of acquittal, wherein this Court could reappraise the whole evidence. According to him, in view of the provisions

of section 401 (3) Cr.P.C., the order of acquittal cannot be converted into the order of conviction in the revision and the revision application, even at the instance of the private party at whose instance appeal is not tenable, may be considered within the limits provided under section 397 and 401(3) Cr.P. C. According to him, the trial Court had minutely considered the prosecution evidence and particularly that of all the 5 eye witnesses before coming to the conclusion that prosecution has failed to prove the guilt of the accused beyond reasonable doubt and therefore, this Court cannot reappraise the evidence and convert the said order of acquittal into conviction. He also opposed the contention of learned Counsel for the applicant that the order of acquittal may be set aside and matter may be remanded back to the trial Court for fresh hearing and disposal as per law.

6. Section 397(1) Cr.P.C. reads as follows:-

"The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any findings. Sentence or order, recorded or

passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record."

From this, it is clear that the High Court or the Sessions Court in revisional jurisdiction may examine the record of any proceeding to satisfy itself as to the correctness, legality or propriety of any findings, sentence or order recorded or passed and as to the regularity of proceedings of such inferior Court. Section 401 Cr.P.C. reads as follows:-

"In the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by Section 386, 389, 390 and 391 or on a Court of Session by Section 307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by Section 392.

(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction.

(4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

(5) Where under this Code an appeal lies but an application for revision has been made to the High court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interest of justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly."

Under sub-section (4) where an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of party who could have appealed. Appeal against the order of acquittal may be preferred by the state under section 378. If the order of acquittal is passed in any case, instituted upon the complaint, with special leave of the High Court the complainant may prefer an appeal against the acquittal. However, where the charge sheet has been filed by the police no such appeal can be preferred by the first informant or victim of the offence. Therefore, he can prefer a revision against the acquittal. However, the revision against the acquittal has itself own limits in view of the specific provisions of sub-section (3) of section 401 of Cr.P.C. which clearly provides that the

High Court is not authorised to covert a finding of acquittal into one of conviction. In this respect the legal position has been settled by the Supreme Court in a number of cases.

7. In **Logendranath Jha and others V. Shri Polai Lal Biswas**, AIR (38) 1951 S.C. 316, Their Lordships observed as follows:-

"Though sub-section (1) of Section 439 authorises the High Court to exercise, in its discretion, any of the powers conferred on a Court of appeal by Section 423, Sub-Section (4) specifically excludes the power to "convert a finding of acquittal into one of conviction". This does not mean that in dealing with a revision petition by a private party against an order of acquittal, the High court could in the absence of any error on a point of law, re-appraise the evidence and reverse the findings of facts on which the acquittal was based, provided only it stopped short of finding the accused guilty and passing sentence on him. By merely characterising the judgment of the trial Court as "perverse" and "lacking in perspective". High court cannot reverse pure findings of the fact based on the trial Court's appreciation of the evidence in the case. That is what the learned Judge in the Court below has done, but could not, in our opinion, properly do on an application in revision filed by a private party against acquittal. No doubt, the learned Judge formally complied with sub-section (4) by directing only a retrial of the appellants without convicting them, and warned that the Court retrying the case should not be influenced by any expression of opinion contained in his judgment. But there can be little doubt that he

loaded the dice against the appellants, and it might prove difficult for any subordinate judicial officer dealing with the case to put aside altogether the strong views expressed in the judgment as to credibility of the prosecution witnesses and the circumstances of the case in general.

8. It may be noted that Section 439 (1) Code of Criminal Procedure, 1898 was similar to section 401 Code of Criminal Procedure, 1973. In case of **K.Chinnaswamy Reddy V/s State of Andhra Pradesh and another**, AIR. 1962 S.C. 1788, Their Lordships considered the provisions of Section 439 Cr.P.C. 1898 and observed as follows"-

"It is true that it is open to a High Court in revision to set aside an order of acquittal even at the instance of private parties, though the State may not have thought fit to appeal, but this jurisdiction should in our opinion be exercised by the High Court only in exception cases, when there is some glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice. Sub-section (4) of Section 439 forbids a High Court from converting a finding of acquittal into one of conviction and that makes it all the more incumbent on the High Court to see that it does not convert the finding of acquittal into one of conviction by the indirect method of ordering retrial, when it cannot itself directly convert a finding of acquittal into a finding of conviction. This places limitations on the power of the High Court to set aside finding of acquittal in revision and it is only in

exceptional cases that this power should be exercised. It is not possible to lay down the criteria for determining such exceptional cases which would cover all contingencies. We may however indicate some cases of this kind, which would in our opinion justify the High Court in interfering with a finding of acquittal in revision. These cases may be; where the trial Court has no jurisdiction to try the case but has still acquitted the accused, or where the trial Court has wrongly shut out evidence which the prosecution wished to produce or where the appeal court has wrongly held evidence which was admitted by the trial Court to be inadmissible, or where material evidence has been overlooked either by the trial Court or by the appeal court, or where the acquittal is based on a compounding of the offence, which is invalid under the law. These and other cases of similar nature can properly be held to be cases of exceptional nature, where the High Court can justifiably interfere with an order of acquittal; and in such a case it is obvious that it cannot be said that the High court was doing indirectly what it could not do directly in view of the provisions of section 439 (4)."

9. In **Akalu Ahir and others V. Ramdeo Ram AIR 1973 S.C. 2145**, Supreme Court held that in a revision against acquittal by the private complainant the High Court cannot reappraise evidence for itself as if it is acting as a Court of appeal and then order a retrial. In **Bansi Lal V. Laxman Singh, (1986) SCC 444** the Supreme Court held that the High Court's power to set aside the order of acquittal should be sparingly exercised. Their Lordships observed in para 9 as

follows:-

"Even in an appeal against an order of acquittal no interference will be made with the judgment of the trial Court except in rare and exceptional cases where there has been some manifest illegality in the approach to the case or the appreciation of the evidence or where the conclusion of fact recorded by the trial Judge is wholly unreasonable so as to be liable to be characterised as perverse and there has been a resultant miscarriage of justice. The revisional jurisdiction of the High Court while dealing with an order of acquittal passed by the trial Court is more narrow in its scope. It is only in glaring cases of injustice resulting from some violation of fundamental principles of law by the trial Court, that the High Court is empowered to be set aside the order of the acquittal and direct a retrial of the acquitted accused. From the very nature of this power it should be exercised sparingly and with great care and caution".

10. Their Lordships also referred and quoted with approval the legal position settled in **K.C. Reddy**. These authorities have been followed recently in **Jagnath Choudhary V. Ramayan Singh A.I.R. 2002 S.C. 2229**. Thus the legal position is well settled by the catena of authorities by the Supreme Court which clearly provides that the High Court in revisional jurisdiction cannot set aside the order of acquittal and give a finding of conviction. The High Court can also not reappraise the whole evidence and come to the conclusion

that the trial Court was wrong in giving finding of acquittal and having done so it cannot remand the matter for retrial which would only mean that the trial Court should render a judgment of conviction.

11. In the present matter, it is not the case of the applicant that prosecution was shut out from leading any evidence or that certain oral or documentary evidence was not considered or that a perverse view was taken on legal aspect resulting wrong findings, due to which the judgment of acquittal could be set aside and the matter could be remanded for retrial, particularly with intent to give further opportunity to prosecution to lead the evidence which it could not in the earlier trial. In the present case, prosecution had examined all the 5 eye-witnesses and led other evidence which was required. Out of the 5 eye-witnesses, one turned hostile and the learned trial Court did not believe remaining 4 witnesses after scrutinising their evidence minutely. In such circumstances, while exercising revisional jurisdiction on the revision application of the complainant, this Court cannot reappraise the prosecution evidence and come to a different findings. In such circumstances, the revision application must

fail.

. In the result revisional application stands dismissed.

(J.H. BHATIA, J.)